

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 10, 2008

PATRICIA BETH STRODE v. CLARENCE WILSON STRODE, JR.

Appeal from the Chancery Court for Rutherford County
No. 06-0558DR Robert E. Corlew III, Chancellor

No. M2007-00265-COA-R3-CV - Filed May 29, 2008

In this divorce action, wife appeals the trial court's classification of a piece of rental property as husband's separate property. Wife further argues that the trial court erred in calculating alimony and the amount awarded for wife's attorney fees. We modify the award of attorney fees and affirm the decision of the trial court in all other respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part,
Modified in Part**

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Charles G. Ward, Murfreesboro, Tennessee, for the appellant, Patricia Beth Strode.

Laurie Y. Young, Murfreesboro, Tennessee, for the appellee, Clarence Wilson Strode, Jr.

OPINION

Patricia Beth Strode and Clarence Wilson Strode were married in 1976 and have two adult daughters.

At the time of the parties' marriage, Mr. Strode had graduated from Middle Tennessee State University with a degree in industrial management. Ms. Strode lacked approximately fifteen hours from graduating with a degree in physical education. She stopped working toward her degree when the parties married and took a minimum wage job at a retail store in Murfreesboro until the parties' first child was born in 1984. In 1989, the Strodes moved from Murfreesboro to Bowling Green, Kentucky, due to Mr. Strode's employment. Mr. Strode changed jobs several times and, beginning around 2001, worked in other parts of Kentucky and Tennessee. Ms. Strode and the children remained in Bowling Green, and Mr. Strode commuted home on the weekends. In December 2001, Mr. Strode was hired by DESA International and moved to Manchester, Tennessee. Ms. Strode and

the children remained in Bowling Green so that the parties' oldest daughter could complete high school there. It was during this period of time when Mr. Strode was living away from the rest of the family that the parties began having marital difficulties. Ms. Strode suspected that her husband was unfaithful to her; Mr. Strode admitted in interrogatory responses and deposition testimony that he had an affair in 2002. In September 2004, Ms. Strode moved back to Rutherford County, Tennessee; she and Mr. Strode lived with his mother at her home. In March 2005, Mr. and Ms. Strode moved into a rental home, where they were living at the time of their separation in June 2005.

After the first child was born in 1984, Ms. Strode was a stay-at-home mother. During the marriage, she had various part-time jobs, primarily working as a bank teller or in retail stores. After the oldest child entered high school, Ms. Strode took a part-time job at Western Kentucky University. She quit this job when she moved back to Tennessee. At the time of the divorce hearing in December 2006, Ms. Strode was working full-time as a pre-kindergarten educational assistant in the Murfreesboro school system. She earned \$14,250.00 per year. Mr. Strode worked at DESA as a plant manager making a base salary of approximately \$76,000.00 per year plus bonuses. He estimated his annual income to be \$80,000.00.

When they lived in Bowling Green during the early years of their marriage, the Strodes purchased a house on Bailey Collins Drive in Smyrna, Tennessee. They sold this house to Mr. Strode's parents before they moved to Kentucky. The property was thereafter used for rental purposes. In May 1999, Mr. Strode's parents quitclaimed the house to Mr. Strode and his sister, Cheri Claybrooke, purportedly for estate-planning purposes. At the same time, Ms. Claybrooke and her husband and Mr. Strode signed a promissory note and an Assumption and Modification of Note and Deed of Trust Agreement regarding the property. Patricia Strode also signed the latter document for the purpose of transferring "all of her marital rights under said Deed of Trust, with no obligation under the terms of the Promissory Note secured thereby." A separate bank account was set up in the names of Mr. and Ms. Claybrooke and Mr. and Ms. Strode to collect rent proceeds and to pay the expenses of the rental property. In March 2004, Mr. Strode's mother paid the mortgage in full. In December 2005, Ms. Claybrooke closed the original bank account and transferred the funds to another account in the names of Mr. and Ms. Claybrooke only.

Ms. Strode filed for divorce in April 2006 on grounds of inappropriate marital conduct and irreconcilable differences. Both daughters had reached the age of majority. The parties were able to stipulate a number of issues. On December 12, 2006, a hearing was held on the remaining issues, including ownership of the property in Smyrna and the associated bank account, spousal support, and responsibility for Ms. Strode's attorney fees. In a memorandum opinion entered on December 21, 2006, the trial court held that the property on Bailey Collins Drive was not marital property, but that the bank account was marital property; Mr. Strode was therefore required to pay Ms. Strode one-fourth of the amount in that account as of the hearing date.¹ The court further required Mr. Strode to pay Ms. Strode a total of \$100,000 in spousal support: \$2,100 per month for 47 months and \$1,300 in the 48th month. As to attorney fees, the court found that Mr. Strode should pay Ms. Strode

¹ Ms. Claybrooke testified that the balance at the time of the hearing was approximately \$8,800.

\$250 per month for 12 months to repay her for a portion of her attorney fees. The final divorce decree was entered on January 16, 2007.

On appeal, Ms. Strode assigns error to the trial court's rulings regarding the Bailey Collins property, spousal support, and attorney fees.

Analysis

Classification of property

____ Ms. Strode argues that the trial court erred in classifying the Bailey Collins property as separate property. She contends that, according to the deed, she and her husband together received a one-half interest in the property. Ms. Strode further contends that she helped increase the value of the property.

The determination as to whether property is marital or separate is “inherently factual.” *McFarland v. McFarland*, No. M2005-01260-COA-R3-CV, 2007 WL 2254576, *4 (Tenn. Ct. App. Aug. 6, 2007). Thus, we review the trial court's classification of property “de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d).

The general rule is that assets acquired by either spouse during the marriage are presumed to be marital property. *McFarland*, 2007 WL 2254576, at *5. Tenn. Code Ann. § 36-4-121(b)(1)(A). However, the definition of separate property includes “[p]roperty acquired by a spouse at any time by gift, bequest, devise or descent.” Tenn. Code Ann. § 36-4-121(b)(2)(D). The quitclaim deed transferring the Bailey Collins property states that “Clarence W. Strode, Sr. and wife, Jewell C. Strode, have this day bargained and sold and do hereby transfer, convey and quitclaim to Cheri A. Claybrooke, married, and Clarence W. Strode, Jr., married, their heirs and assigns” the property in question.² While Clarence Strode, Jr. and his sister, Ms. Claybrooke, are described as “married,” this language is descriptive and does not appear to evince an intent to transfer the property to the spouses. Patricia Strode signed the Assumption and Modification of Note and Deed of Trust Agreement specifically to divest herself of any marital rights in the property and to make clear that she had no obligation on the promissory note. The testimony of Mr. Strode and his sister was that their mother deeded the property to them for estate-planning purposes and that they intended to use the property to take care of her. Patricia Strode did not dispute this testimony, but it was her understanding that she and Mr. Strode held an interest in the property. The language of the deed and the circumstances surrounding the transfer provide support for the trial court's classification of the Bailey Collins property as separate property. We cannot say that the evidence preponderates against the trial court's classification.

²The stated consideration for this transfer was ten dollars. Ms. Strode does not dispute that the transfer was a gift.

Separate property can become marital property by virtue of transmutation “if there is evidence that the parties intended for it to be marital property and treated it as such.” *Whitley v. Whitley*, No. M2003-00045-COA-R3-CV, 2004 WL 1334518, at *6 (Tenn. Ct. App. June 14, 2004). Underlying the doctrine of transmutation is the rationale that dealing with property as if it is marital property creates a rebuttable presumption of a gift to the marital estate. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002). The presumption of a gift to the marital estate may be rebutted “by establishing that one of the legal requirements of a gift is missing.” *Burns v. Burns*, No. 01-A-01-9705-CH-00218, 1997 WL 691533, at *4 (Tenn. Ct. App. Nov. 7, 1997). The legal requirements of a gift are “the intention by the donor to make a present gift coupled with the delivery of the subject gift by which complete dominion and control of the property is surrendered by the donor.” *Hansel v. Hansel*, 939 S.W.2d 110, 112 (Tenn. Ct. App. 1996).

In support of her argument that the real property should be classified as marital property, Ms. Strode cites statements made by Mr. Strode in his deposition. He stated: “[O]nce we dispose of the house, get any money out of it, I don’t mind sharing half of my half with her.” Mr. Strode further testified that he did not have a problem with Ms. Strode getting one-fourth of the value of the property. We do not believe this testimony alone is sufficient to indicate an intention to make a gift of the property to the marital estate. In any event, there is no evidence that Mr. Strode delivered an interest in the property to Ms. Strode by taking action necessary to give her dominion or control over the property. He and his sister alone owned the property, and Ms. Strode had minimal involvement with it. With the exception of one occasion on which Ms. Strode assisted with some landscaping, the care and maintenance of the property was done by third parties and paid for from the rental account. When the Strodes paid taxes on income from the property, they were reimbursed from the rental account. The evidence does not support a conclusion that the Bailey Collins property ever became part of the marital estate.

Under Tenn. Code Ann. § 36-4-121(b)(1)(B), marital property “includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation.” A substantial contribution is defined to include “the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager.” Tenn. Code. Ann. § 36-4-121(b)(1)(D). Thus, even though the Bailey Collins property is separate property, any increase in its value during the marriage could properly be classified as marital property if each spouse substantially contributed to the property’s appreciation. The parties gave differing estimates as to the current value of the Bailey Collins property: Ms. Strode valued it at \$140,000.00; Mr. Strode, at \$110,000.00. There was no evidence presented as to how much, if at all, the value of the house increased during the marriage. The only evidence of Ms. Strode’s work on the property was testimony that she had helped Ms. Claybrooke with some landscaping one day. The evidence does not preponderate against the trial court’s finding that “there is no evidence of particular efforts on the wife’s part on the house which would justify a finding that the husband’s ½ interest became marital property.”

We have concluded that the evidence does not preponderate against the trial court's finding that the Bailey Collins house is separate property.³

Spousal support

Ms. Strobe argues that the trial court erred in the amount of rehabilitative alimony awarded to her at \$2,100 a month for 47 months and \$1,300 in the 48th month for a total of \$100,000. Ms. Strobe seeks a modification of the rehabilitative alimony amount to \$3,000 for 48 months and \$2,100 for the next 48 months.

Ms. Strobe desires to increase her earning capacity by returning to college to obtain a bachelor's degree in early childhood education and then a master's degree. By doing so, she hopes to be in a position to earn approximately \$37,000 a year, in contrast to the \$14,250 a year she now earns. To fulfill this goal, Ms. Strobe proposes to be a fulltime college student for four and one-half years, working parttime, and then to work fulltime while completing her master's degree for another three and one-half years. She estimates the total cost of the eight years of education to be \$44,800.

Trial courts have broad discretion to determine whether spousal support is needed and, if so, the appropriate type of alimony, amount, and duration. *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004).

The applicable legal standards are set forth at Tenn. Code Ann. § 36-5-121, which authorizes several classes of spousal support: alimony in futuro, rehabilitative alimony, alimony in solido, and transitional alimony. Tenn. Code Ann. § 36-5-121(d)(1). Tenn. Code Ann. § 36-5-121(d)(2) expresses a statutory preference for rehabilitative alimony over long-term alimony in futuro and provides:

To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(i) gives a list of twelve factors to be considered by a court in determining whether alimony is appropriate and in determining the nature, amount, length of term, and manner of payment of the alimony. We will proceed to analyze each of these factors. It is important to note at the outset that the two most important factors are the need of the disadvantaged spouse and the other spouse's ability to pay. *Bratton*, 163 S.W.3d at 604.

³The trial court's classification of the related bank account as marital property is not an issue on appeal.

(1) Relative earning capacity, obligations, needs, financial resources. In this case, there is a clear disparity in income and earning capacity. Mr. Strode has an established career in industrial management with earnings of approximately \$80,000 per year with bonuses and a monthly net income from salary of \$4,743.00. Ms. Strode spent most of the marriage as a stay-at-home mother, working occasionally at parttime jobs. At the time of the hearing, she was working as a fulltime educational assistant for approximately \$14,250 a year, bringing home an income of \$1,182.00 per month. According to Ms. Strode, her monthly expenses total \$5,104.82; this figure includes an expected cost of \$700 for health insurance and \$467 for tuition. Referring back to the original statement of expenses upon which Ms. Strode is basing her current expense estimate, we note the inclusion of \$400.00 for children's gas, books, and expenses and \$250.00 in attorney fees. Since the Strode children are both adults and since we are awarding Ms. Strode all of her attorney fees at the trial level, we will consider her true expenses with health insurance and tuition to be \$4,454.82. Mr. Strode's statement of need shows monthly expenses of \$3,726.00.

(2) Relative education and training. Mr. Strode has a college degree in industrial management. Ms. Strode does not have a college degree. She was about fifteen hours from completing her college degree prior to the parties' marriage. According to her testimony, most of her prior college credits will not transfer to a current degree program. In light of these first two factors, Ms. Strode is the economically disadvantaged spouse in comparison to Mr. Strode.

(3) Duration of marriage. The Strodes were married for 30 years.

(4) Age and mental condition. Mr. Strode was 54 years old at the time of the hearing. Ms. Strode was 51 years old.

(5) Physical condition. Ms. Strode testified about her medical problems, including high cholesterol, clinical depression, insomnia, and a heart murmur. There was no evidence showing that any of these conditions significantly limited her ability to work. There was no evidence presented of any health problems on the part of Mr. Strode.

(6) Undesirability of employment due to minor children. Not applicable.

(7) Separate assets. The only significant separate asset reflected in the record is Mr. Strode's half interest in the Bailey Collins rental property.

(8) Provisions regarding marital property. There was no marital real estate. The Bailey Collins rental account and Mr. Strode's retirement accounts were equally divided. Mr. Strode was given responsibility for the largest marital credit card debt (\$6,200). Ms. Strode was to be responsible for two other credit card debts incurred by her primarily after the separation.

(9) Standard of living during the marriage. The parties enjoyed a comfortable standard of living during the marriage, but after a number of changes in Mr. Strode's job and related moves, the parties ended their marriage in a rental home.

(10) Tangible and intangible contributions to the marriage and to the other spouse's education, earning power. Mr. and Ms. Strode both contributed to the marriage, with Mr. Strode being the primary breadwinner and Ms. Strode working mainly as a stay-at-home mother and homemaker. Neither party pursued significant educational advances after the marriage. Mr. Strode emphasizes that Ms. Strode had the opportunity to complete her college degree when she was employed at Western Kentucky University. However, as Ms. Strode points out, she used her free credits to benefit one of their daughters; moreover, at that time, Ms. Strode did not know that she was going to need to reenter the job market and support herself.

(11) Relative fault. Tenn. Code. Ann. § 36-5-121(i)(11) specifically states that the relative fault of the parties may be considered “in cases where the court, in its discretion, deems it appropriate to do so.” In this case, the trial court found that fault was “a minor factor” favoring the award of alimony to Ms. Strode.

(12) Other factors, including tax consequences. In its memorandum opinion, the trial court stated that if Ms. Strode were awarded the requested amount of \$36,000 per year and if the parties' incomes remained the same, “then after the husband paid alimony, he would have \$44,000 per year with which he would be required to pay income tax on \$80,000, and the wife would have \$50,000 per year with which she would only be required to pay income tax on \$14,000.” Under current federal tax laws, however, alimony payments are generally deductible by the payor and included in the income of the payee. I.R.C. §§ 71(a), 215(a).

Once a determination is made that a spouse is economically disadvantaged, the court must determine whether the spouse can be rehabilitated. We must acknowledge that the question of whether Ms. Strode is a candidate for rehabilitation is a difficult one.⁴ By awarding rehabilitative alimony, the trial court necessarily found that Ms. Strode was capable of at least partial rehabilitation, and Ms. Strode has not assigned error to the award of rehabilitative alimony, only to the amount.

The trial court did not, however, award Ms. Strode the total amount she purportedly needed to fund her rehabilitation. Ms. Strode requested an award of \$3,000 per month for 48 months and \$2,100 per month for the next 48 months, which would have resulted in a total of \$244,800 in rehabilitative alimony. Ms. Strode based her estimated monthly expenses of \$5,104.82 in part upon the assumption that she would be working only parttime and would need to pay for health insurance at the rate of \$700 per month. The trial court, however, based its calculations on the assumption that Ms. Strode would continue working fulltime. Ms. Strode's monthly expenses would therefore be reduced by \$700, resulting in a total of \$3,754.82, a figure which includes \$467 for tuition. With

⁴ While each alimony determination is fact specific, we note several cases involving spouses in their 50's in which the court found that the evidence did not support rehabilitation. See *Oakes v. Oakes*, 235 S.W.3d 152, 161 (Tenn. Ct. App. 2007); *Jekot v. Jekot*, 232 S.W.3d 744, 753 (Tenn. Ct. App. 2007); *Barlew v. Barlew*, No. E2004-01654-COA-R3-CV, 2005 WL 954797, at * 4 (Tenn. Ct. App. April 26, 2005). Cf. *Owens v. Owens*, 241 S.W.3d 478, 495 (Tenn. Ct. App. 2007) (increasing amount of rehabilitative alimony to allow wife in mid-50's with real estate license to establish a new career in real estate).

a net income of \$1,182 a month and alimony in the amount of \$2,100, Ms. Strode's monthly income would total \$3,282. In explaining its alimony award, the trial court expressed some skepticism as to "the sincerity of [Ms. Strode's] desire for education." As this finding hinges on Ms. Strode's credibility, we give it great deference. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). Moreover, although it appears that the trial court's tax assumptions were erroneous, the court rightly considered the economic realities of Mr. Strode's ability to pay. Mr. Strode's net monthly income is \$4,743.00 and his monthly expenses are \$3,726.00. Even with the alimony award of \$2,100 a month, Mr. Strode's expenses and alimony combined exceed his income. We must also consider, however, the fact that Mr. Strode earns bonuses, owns an interest in the rental house, and, significantly, did not appeal the alimony award.

Taking into account all of the relevant factors, particularly Ms. Strode's need and Mr. Strode's ability to pay, we conclude that the trial court did not abuse its discretion in setting rehabilitative alimony in this case.⁵

Attorney fees

_____ The trial court awarded Ms. Strode an additional \$250.00 per month for twelve months to repay her for some of her attorney fees. Ms. Strode testified that her attorney fees were approximately \$6,000, so the trial court required Mr. Strode to pay half of those fees. On appeal, Ms. Strode argues that the trial court erred in not requiring Mr. Strode to pay all of her attorney fees.

An award of attorney fees in a divorce case is generally characterized as alimony in solido. *Owens v. Owens*, 241 S.W.3d 478, 495 (Tenn. Ct. App. 2007). Thus, in considering a request for attorney fees, a trial court must consider all of the factors contained in Tenn. Code Ann. § 36-5-121(i). A trial court ordinarily "will award attorney's fees as alimony when an economically disadvantaged spouse would otherwise be forced to deplete assets in order to pay attorney's fees." *Id.* at 496. At the end of a 30-year marriage, Ms. Strode finds herself with few assets and a great disparity in earning capacity in comparison to Mr. Strode. Under the circumstances in this case, we have concluded that the trial court erred in failing to award Ms. Strode all of her attorney fees at the trial level.

⁵ An award of rehabilitative alimony "shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of a substantial and material change of circumstances." Tenn. Code Ann. § 36-5-121(e)(2). This provision would even allow the trial court to change the alimony award to alimony in futuro if the prospects for rehabilitation changed. *Garland v. Garland*, No. E2002-00949-COA-R3-CV, 2003 WL 288431, at *2 (Tenn. Ct. App. Feb. 10, 2003).

The judgment of the trial court is modified with respect to the amount of attorney fees awarded; Mr. Strobe shall pay Ms. Strobe \$250.00 per month for a total of twenty-four (24) months to reimburse her for attorney fees of \$6000. Otherwise, the judgment of the trial court is affirmed. Costs of appeal are assessed equally between the parties.

ANDY D. BENNETT, JUDGE